No. 16230

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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UNITED STATES OF AMERICA,

*Plaintiff and Appellant,*

*vs.*

LO BUE BROTHERS, a Partnership; MARIO LO BUE, FRED LO BUE, and JOSEPH LO BUE, Partners; and WILLIAM LUTHER WOODALL,

*Defendants and Appellees.*

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**On Appeal From the United States District Court for the Southern District of California, Northern Division.**

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## BRIEF FOR THE APPELLEES.

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This brief will be in two parts. Part I is in reply to the appellant's brief. Part II is in reply to the *amicus curiae* brief of Sunkist Growers, Inc. All references to the record are to the printed Transcript of Record.

## PART I.

### Jurisdictional Statement.

The jurisdictional statement in appellant's brief is inaccurate in two particulars.

First, it is stated, on page 1, that the complaint was filed pursuant to 7 U.S.C. 1952ed. Sec. 608a(5)-(7) of the Agricultural Marketing Agreement Act of 1937, as

amended. The reference to "Sec. 608a(5)-(7)" embraces Sec. 608a(6), which is a provision authorizing specific enforcement and restraint against violation of orders and regulations. But jurisdiction under that subdivision was exercised and exhausted in case No. 1637-ND in which a consent decree for permanent injunction was entered against appellee Lo Bue Brothers on April 19, 1956. [R. 28.]

Second, the loose statement is made, on page 2, that the complaint alleges that the appellees ". . . 'willfully' shipped navel oranges in excess of the allotments established for the defendant Lo Bue Brothers . . . thereby subjecting the defendants to liability for three times the market value of the fruit shipped in excess of the allotments." Sec. 608a(5), however, provides only that "Any person willfully exceeding any quota or allotment fixed for him . . . shall forfeit to the United States a sum equal to three times the current market value of such excess . . ." Nothing is said about "shipping," and the question arises whether mere shipment incurs a forfeiture in any case, or whether there must also be a sale. The significance of this in the present case will appear later in this brief.

## Statement of Facts.

The Statement of Facts in appellant's brief (pp. 10-16) is not acceptable to the appellees. It is repeatedly stated in appellant's brief that most of the facts were stipulated to, and that there are no conflicts in the evidence. Furthermore, the District Court's Findings of Fact are comprehensive and detailed. [R. 78-91.] Yet by means of omissions, inaccuracies, and the quotation of fragments of testimony out of context, the appellant has succeeded in slanting its Statement of Facts against the appellees.

On page 12 of appellant's brief, it is said that the appellee William Luther Woodall, sales manager for appellee Lo Bue Brothers, "knew that the shipments were in excess of the allotments for Lo Bue Brothers." That statement is a part of an oral stipulation, the rest of which is, "but he also knew that the petition had been filed and he believed that they were exempted." [R. 99.]

Immediately following that, on page 12 of the brief, appellant states that appellees consulted an attorney "to determine how they could ship their excess fruit." In the first place, the appellees consulted an attorney regarding Lo Bue Brothers only. Mr. Woodall was not a handler or a shipper, he had no prorate base or allotments, and he was not subject to the marketing order or the regulations under it. [R. 106-108, 113, 114, 124, 126, 180, 181.] In the second place, the appellees consulted an attorney to determine whether there was any way in which Lo Bue Brothers could *legally* ship its excess fruit. [R. 106-108, 158-161, 180-182.] On page 13 of the brief, selected excerpts from the testimony of Mario Lo Bue are quoted with the evident purpose of creating the false impression that he was not concerned with the legality of his actions. [See R. 107, 108.]

Nowhere in the Statement of Facts is there any reference to the nature of Lo Bue Brothers' 15(A) petition for administrative relief, or the grounds upon which it was filed. The petition alleged, in substance, that in the year 1956, for the first time, the Navel Orange Administrative Committee was arbitrarily and unreasonably regulating and restricting the marketing of the Central California navel orange crop far beyond its historical marketing period, that it was proposing to regulate and restrict the marketing of the Southern California navel orange

crop for a substantially shorter period beyond its historical marketing season, that when this discrimination occurred Central California did not have fair or adequate representation on the Administrative Committee, and that the declared policy and purpose of the Act was thereby defeated, and Lo Bue Brothers and the growers whose fruit it marketed were thereby being deprived of their property without due process of law, and their property had been and was thereby being taken, confiscated and destroyed without compensation therefor, in violation of the Fifth Amendment to the Constitution of the United States. [R. 25-27, 85-87.]

At the bottom of page 13 and the top of page 14 of appellant's brief, the statement is made that "Mr. Lo Bue did not expect the injunction to be served during the week-end of April 7 and 8 when the excess shipments were made." The significance of this is not apparent, but the entire testimony of Mr. Lo Bue on that subject does not justify the statement quoted above. [R. 118-120.]

Next, on page 14 of its brief, the appellant quotes several fragments of testimony regarding statements made by appellee Woodall at a meeting of the Navel Orange Administrative Committee at Los Angeles in March, 1956. It does say that Mr. Woodall was "representing himself," but it does not say that Mr. Woodall is a navel orange grower, that he attended the meeting only as a grower, that he was not authorized to appear or speak for Lo Bue Brothers, and that when he spoke of this intention to find some way to ship his fruit he was referring only to his own personally owned fruit. [R. 137-143.] Neither does it say that M. D. Street, a member of the Administrative Committee, and a witness for the plaintiff, testified, "I think he was speaking principally for himself." [R. 146.]

On pages 15 and 16 of its brief the appellant undertakes to summarize the testimony of G. V. Weikert, attorney for the appellees, but leaves out important portions of that testimony. Omitted is the following:

> That after hearing Mr. Woodall's statement of the facts, said attorney expressed the opinion that there was grave doubt as to the legality of the Committee's action, and that the only thing that could be done was to follow the administrative procedure outlined in the Act, which consisted of filing what is known as a 15(A) petition. [R. 181.]
>
> That said attorney also told Mr. Woodall that in the only cases he knew of, which were two cases decided in the District Court at Los Angeles in 1944, which had never been appealed and had become final, the immunity provided by the Act during the pendency of a 15(A) petition filed in good faith had been construed to extend to civil penalties as well as criminal penalties. [R. 182.]
>
> That said attorney testified that he has had frequent communications over the years with departments and agencies of the federal government in Washington, and also with many individuals in Washington, D. C., and it has been his experience that airmail deposited in the mail at Los Angeles one day is delivered invariably in Washington to the addressee the next day. [R. 183.]
>
> That said attorney testified that he had no knowledge as to the manner in which mail for the Department of Agriculture is handled in Washington, and had no knowledge of any alleged practice of holding mail for the Department of Agriculture received on a Friday after 2:00 p. m. until the following Monday,

and had no knowledge that the entire Department of Agriculture is closed all day Saturday. [R. 183.] That said attorney testified that in the preceding twenty years his practice, to a very considerable extent, has dealt with cases arising out of the activities of the Department of Agriculture, and that he has specialized in agricultural marketing, and the fruit and produce business and its problems generally. [R. 186.]

That said attorney testified that over the years he has prepared and filed quite a number of 15(A) petitions for various shippers, raising various legal questions with regard to various marketing orders, not only with regard to oranges, but also lemons and other commodities, although this is the only one he has filed on this particular marketing order. [R. 184.]

That said attorney testified that it has been his experience in filing 15(A) petitions that they were delivered in Washington the next day, that he has never telephoned the hearing clerk's office in Washington to see whether a petition was on file, and he did not do so on this occasion. [R. 184, 186.]

That said attorney further testified that this 15(A) petition was filed for the purpose of obtaining a ruling upon what he believed to be a unique, substantial and meritorious question of law, based upon a very substantial complaint and injury, and that he advised the petitioners that they had every right to avail themselves of the privilege given them by the Congress in this legislation of disregarding the allotment until and unless they were enjoined. [R.187.]

In the last paragraph of the Statement of Facts, on page 16 of appellant's brief, it is said that the administra-

tive hearing on Lo Bue Brothers' 15(A) petition was held on June 14, 1956, and that Mr. Woodall (who was not a petitioner) testified that he does not remember whether he saw or communicated with Mr. Weikert during the period from the filing of the petition to the date of hearing. It is not stated that appellant's counsel did not ask that same question of Mr. Mario Lo Bue, who was a petitioner. [R. 113-127.]

In the same paragraph, on page 16 of the brief, appellant says that the decision on the administrative petition was adverse to the defendants, and no appeal was taken from the administrative decision. Appellant does not say that after the hearing on June 14, 1956 a brief was filed on behalf of the petitioners, Lo Bue Brothers, that the hearing examiner issued a report containing proposed findings of fact and conclusions on September 28, 1956, that written exceptions to this report were filed by Lo Bue Brothers, and that it was not until December 3, 1956 that the Judicial Officer of the Department of Agriculture issued his decision and order denying relief and dismissing the petition. [R. 28, 88.]

The following facts are omitted entirely from the appellant's Statement of Facts:

(a) The navel oranges in the 26 shipments involved in this case were owned by some 15 or 18 growers, and were handled by Lo Bue Brothers on consignment, as the agent of those growers. [R. 129, 130-132, 84.]

(b) While Lo Bue Brothers received from the sale of two of said shipments, which were sold before April 9, 1956, the gross sum of $3,520.75, and received from the ultimate sale of the remaining 24

shipments, after that date, the gross sum of $46,-349.99, it paid to the growers who owned the fruit the net sum of approximately $29,000.00, the difference going to cover the cost of picking, hauling, handling, loading, shipping and selling the fruit, and the net sum of money received by Lo Bue Brothers as compensation for handling said fruit amounted to approximately $1,800.00. [R. 111, 112, 84.]

(c) Mario Lo Bue, the managing partner of Lo Bue Brothers, testified that he relied completely upon the advice received from his attorney, that when he made the shipments in question he did not believe that he was violating any law, order, or allotment, and that he would not have made these shipments if he had felt that by doing so he was guilty of any kind of violation. [R. 105, 107, 89, 90, 91.]

### Judgment of the District Court.

Under the above heading, on pages 16 and 17 of its brief, the appellant undertakes to epitomize the decision and judgment of the District Court, and to state "specifically" what the Court concluded. In so doing it telescopes the Court's decision and findings far too much.

In its Memorandum of Decision the District Court discussed in detail the three prior decisions construing Section 608a(5) and 608c(14) of the Act, all in the Southern District of California, all final, and all holding that the filing in good faith of a 15(A) petition exempts the petitioner from all penalties under the Act, civil and criminal alike. [R. 65-67.] The Memorandum Decision goes on to say this:

"Counsel for the plaintiff state that the three cases above noted, decided by Judge Hollzer, are the

only cases which have construed the proviso contained in Section 608(c)(14). My research has failed to disclose any other decisions on the subject rendered by any United States court." [R. 70, 71.]

The District Court did conclude "specifically," as appellants says, that the excess shipments were not "willful" because the appellees relied on the advice of their attorney that the filing of a 15(A) petition would exempt them from civil liability as well as from a fine, and that their petition "would be on file with the Secretary of Agriculture" on April 6, and they could begin the next day to make shipments in excess of their allotments. But that is not all. The District Court also concluded, "specifically," in its Memorandum Decision that:

> "It is my view that the acts of the defendants cannot be characterized as 'wilful.' They consulted a reputable attorney who had had extensive experience under laws administered by the Department of Agriculture. His advice was based upon the only Court decisions which had been rendered construing the proviso in Section 608(c)(14) of Title 7 U.S.C. His advice was in accordance with such decisions. Before shipments were made by the defendants in excess of their quota, the attorney telephoned them that the '15-A' petition had been filed, and that they could ship under the immunity provided by that same section. The defendants, in my opinion, in good faith, relied upon the advice and information furnished them by their attorney. The defendants, therefore, are entitled to have judgment entered in their favor." [R. 71, 72.]

And the District Court made specific findings in accordance with its Memorandum Decision. It also found as follows:

> "Said attorney also truthfully informed the defendants that his past experience had established the fact that petitions of this kind air mailed by him from Los Angeles, California to the Secretary of Agriculture at Washington, D. C. were received and filed the next day." [R. 90.]
>
> * * * * * * * *
>
> "That the defendants accepted and believed the said advice and information given them by their said attorney, and defendant Lo Bue Brothers acted in good faith in reliance thereon in filing said petition with the Secretary of Agriculture and in making said twenty-six shipments of navel oranges in excess of its allotments on April 7, 1956 and April 8, 1956, and in so doing defendant Lo Bue Brothers exercised ordinary and reasonable care and caution to avoid violating Order No. 14, and did not knowingly, intentionally, or wilfully exceed its allotments thereunder." [R. 90, 91.]

## Summary of Argument.

Only one question is raised by this appeal, but in the appellant's brief it is all but swallowed up in a sea of repetitious words. The one question is whether, under the undisputed facts of this case, the appellee Lo Bue Brothers exceeded any quota or allotment fixed for it under Order No. 14 by the Secretary of Agriculture "willfully," within the meaning of Section 608a(5) of the Act.

There are many other questions and issues which *might* have arisen, had the decision of the District Court been different, such as the following:

Does the exemption provided in Sec. 608c(14) of the Act apply to civil penalties as well as to criminal fines?

In any case, is an individual, employed as sales manager, personally subject to civil penalties for violations of his employer, in addition to the penalties imposed upon the employer?

If such employee is personally subject to such penalties, then is not the broker who actually made the sales in excess of allotments also liable for civil penalties?

Does the mere loading and shipping in a car or truck of fruit in excess of allotment, which might never be sold, subject the shipper to civil penalties in any case, or must the fruit be actually sold and thereby entered into the channels of trade?

What is meant by the provision in Sec. 608a(5) of the Act that one who willfully exceeds his quota or allotment shall forfeit a sum equal to three times the current market value of such excess?

Does "current market value" mean the value of the fruit on the trees, or when it is received at the packing house, or after it has been packed, or after it has been loaded on cars or trucks, or after it has arrived at some distant destination? The fruit could be marketed at any one of those stages, and it has a different market value at each of them because, for one reason, they all involve different costs and charges. Which "market value" is meant in the Section?

Does it not follow, in any case, that the fruit must be actually sold, at some stage of its handling, before its "current market value" can be determined?

Does the expression "current market value" refer to the value of the fruit to its owner, or its value to the shipper who handles it as agent for the owner?

If, for instance, the shipper actually receives and retains no more that $1800.00 out of the total amount ultimately received from the sale of all fruit shipped in excess of allotment, and actually receives and retains no more than $130.00 from the fruit in excess of allotment sold at time of shipment, do not those figures represent the "current market value" of the fruit to the shipper?

Can anyone "forfeit" anything he has never had and is not entitled to receive?

None of the foregoing moot questions was considered or passed upon by the District Court, for the reason that none of them was involved in the case, under the view taken of it by that Court. And the appellant has not mentioned any of those moot questions in its brief, with the exception of the first one, that is, whether the exemption afforded a 15(A) petitioner extends to civil as well as criminal penalties. That one the appellant discusses repeatedly and at great length, although it has no bearing whatever upon the decision and judgment from which this appeal is taken. The appellees do not propose to be drawn into a lengthy and detailed argument on any moot question, but some comment will be made upon the subject of exemption after the real issue in the appeal has been discussed.

## ARGUMENT.

### Appellees Did Not Willfully Exceed Any Allotment.

The essential facts in this case are undisputed. They are concisely summarized in the District Court's Memorandum Decision [R. 63-72] and they are set forth in full detail in the Court's Findings of Fact. [R. 78-91.] The only question raised by this appeal is whether, on those facts, appellee Lo Bue Brothers "willfully" exceeded any quota or allotment fixed for it by the Secretary of Agriculture, within the meaning of Sec. 608a(5) of the Act. This question, of course, turns upon the meaning and application of the word "willfully" as used therein.

This subject is discussed in *94 Corpus Juris Secundum.* At pages 620 and 621, it is said:

> "The words 'willful' and 'willfully' are of familiar use in every branch of the law, being commonly employed in averring or describing an act, or in denoting the quality of an act, or in describing the intent with which an act is done; and when so used the terms imply the ability to do the act described.
>
> " 'Willful' and 'willfully' have various meanings, are susceptible of different shades of meaning or degrees of intensity, and are used in different senses in different connections, and generally their signification will depend on the context in which they appear, the nature of the subject to which they refer, and the evident purpose of the writer.
>
> "The words are not necessarily technical, and in civil jurisprudence they are not considered to be words of art, and, although it has been said that they have a well-defined signification in law, they are elastic words, and have acquired no peculiar meaning in law

which is universally accepted. In certain branches of the law they do have a technical or special meaning, and there is a difference in meaning in common usage and as used in the field of criminal law, and *when used in penal statutes* and in statutes dealing with crime *they have a restricted meaning* which is accepted, well-understood, and well-defined, but even in the field of criminal law the meaning of the terms is rather flexible. *When used in penal statutes* and in statutes dealing with crime *the words are strong and forceful, and of substantial meaning, and are to be given force and effect.*" (Emphasis supplied.)

And at pages 624 and 625 of *94 Corpus Juris Secundum,* the discussion continues:

"The words 'willful' and 'willfully' imply such elements as design, intent and purpose, deliberation, determination, and premeditation; and they are commonly employed to denote an act which is wrongful or prohibited by law, and also to indicate the intentional and deliberate doing of a wrongful act; the doing of a forbidden act purposely in violation of law.

"The terms may import a specific intent to violate the law; a specific intent to do what the law forbids; a deliberate intent or a purpose to do a wrongful act; an intent to commit a wrong either through actual malice or from which malice will be imputed; a deliberate purpose to accomplish something forbidden; a determination to do the act although known to be forbidden; a determination to execute one's will in spite of defiance of the law; a determination to do a prohibited act with a bad intent and without justifiable excuse; a deliberate intention for which there is no reasonable excuse. *The terms may, therefore,*

*denote a conscious or intentional violation of law, and convey the idea of an act done with knowledge that it is unlawful, and they are sometimes used to signify that a person has failed to obey a statute, having knowledge of the facts."* (Emphasis supplied.)

Perhaps the leading case in point, and certainly the one most frequently quoted and relied upon in later decisions of the Circuit Courts of Appeals, is *United States v. Illinois Central Railroad Co.,* 303 U. S. 239. This is one of the cases cited in the Memorandum Decision of the District Court. [R. 71.] In appellant's brief, 113 decisions are cited or mentioned, but not this one. This was an action to recover a penalty for willful failure to unload, feed and water cattle for over twenty-eight hours. At pages 242 and 243, the Supreme Court said:

"Our opinion in *United States v. Murdock,* 290 U. S. 389, 394, shows that it (the word willfully) often denotes that which is 'intentional, or knowing or voluntary, as distinguished from accidental', and that it is employed to characterize 'conduct marked by careless disregard whether or not one has the right so to act' . . . *"Willfully" means something not expressed by "knowingly",* else both could not be used conjunctively' . . . 'So, giving effect to these considerations, *we are persuaded that it means purposely or obstinately* and is designed to describe the attitude of a carrier, who, having a free will or choice, *either intentionally disregards the statute or is plainly indifferent to its requirements.*' That statement has been found a useful guide to the meaning of the word 'willfully' and to its right application in suits for penalties under section 3." (Emphasis supplied.)

The definition of the word "willfully," which the Supreme Court in the *Illinois Central* case quoted and termed "a useful guide," was pronounced by Mr. Justice Van Devanter, then a Judge of the 8th Circuit Court of Appeals, in *St. Louis & San Francisco Railroad Co. v. United States,* 169 Fed. 69, 70. That case is not cited in appellant's brief. It was quoted with approval in other cases not cited by appellant, including *Oregon-Washington Railroad & Navigation Co. v. United States* (C. A. 9), 205 Fed. 337, 339, *Zimberg v. United States* (C. A. 1), 142 F. 2d 132, 137, and *Kempe v. United States* (C. A. 8), 151 F. 2d 680, 688.

In the most recent case cited in appellant's brief, *Riss & Co. v. United States* (C. A. 8), 262 F. 2d 245, 248, which was an action to recover a penalty for willful violation of an Interstate Commerce Commission rule limiting the driving time of operators of motor common carriers, the Court not only quoted and adopted Justice Van Devanter's definition of "willfully," but it added its own emphasis to the words *"either intentionally disregards the statute or is plainly indifferent to its requirements."*

Another pertinent case not cited in appellant's brief is *Nabob Oil Co. v. United States* (C. A. 10), 190 F. 2d 478. That case arose out of an indictment for willful violation of the Fair Labor Standards Act. The Court of Appeals for the Tenth Circuit was called upon to consider the propriety of this jury instruction (p. 479):

> "The word 'wilfully' connotes an intentional violation of the law. And you are advised, gentlemen of the jury, *that a defendant who actually does violate* the provisions of the Fair Labor Standards Act *would not be guilty of a criminal offense unless he is either conscious of the fact that what he is doing*

*constitutes a violation of the Act or unless he wholly disregards the law and pursues a course without making any reasonable effort to determine whether the plan he is following would constitute a violation of the law or not .*" (Emphasis supplied.)

The Court of Appeals approved that instruction, saying (p. 480):

"We have, however, considered the sufficiency of the instruction and are of the opinion that *the definition correctly defines the term 'willful' as used in statutes such as the one being considered here.*" (Emphasis supplied.)

In its Memorandum Decision the District Court cites *Nicastro v. United States* (C. A. 10), 206 F. 2d 89, an action which arose under the Price Control Act, and quotes from it the following [R. 71]:

"The word 'wilful' as used in the statute means voluntary, knowing, and intentional, as distinguished from accidental, involuntary or unintentional. It does not mean with an evil purpose or criminal intent. Practicable precaution against the occurrence of the violation . . . means the exercise of ordinary care and caution to avoid the commission of the wrong."

The Court of Appeals in that case went on to show what does and what does not constitute ordinary care and caution to avoid a violation, and its holding is particularly fitting to the case at bar, in the light of the undisputed facts. The Court of Appeals said (p. 92):

"All the owners did in respect to the exercise of ordinary care and caution to avoid the commission of the wrong was to entrust the whole matter to the

judgment of their bookkeeper. *They did not seek legal advice nor official interpretation* with respect to the effect of their increasing the price of beverages, *or otherwise inquire with respect to whether such increases would result in a violation of the regulation.* Clearly, their acts were wilful and they failed to take any practicable precautions against an occurrence of their violation." (Emphasis supplied.)

It is submitted that under the well established rules of interpretation laid down by the authorities cited above, it could not be found that the appellees "willfully" exceeded any quota or allotment fixed for Lo Bue Brothers by the Secretary of Agriculture, in the face of the undisputed facts that while the appellees knew that the shipments in question were in excess of Lo Bue Brothers' allotment, they relied upon the advice of their counsel that the 15(A) petition had been filed, and that therefore they had a legal right to make these shipments, that they would not otherwise have made the shipments, and that in making them they had no intention of violating the marketing order or the law, and did not believe that they were violating the same.

### The Appellees Acted in Good Faith.

The District Court found that Lo Bue Brothers acted in good faith in filing its 15(A) petition and in making the shipments in question. [R. 90.] The lengthy argument in appellant's brief as to the status and treatment of findings of fact on appeal seems unnecessary, since the subject is fully covered and governed by Rule 52(a) of the Federal Rules of Civil Procedure, which is not cited by appellant.

The appellant attacks the finding of good faith on several grounds. Great stress is laid upon the statements made by the appellee Woodall at meetings of the Navel Orange Administrative Committee to the effect that he intended to find some way to ship his fruit. The appellant continues to ignore the fact that Mr. Woodall appeared at those meetings on his own behalf as a navel orange grower and was not authorized to represent or speak for his employer Lo Bue Brothers, and that he was referring only to shipment of his own fruit. [R. 137-143, 146.]

Then the appellant again selects an isolated, out-of-context statement from the testimony of Mario Lo Bue as "undisputed evidence" that the petition was filed "only for the purpose of permitting the defendants to ship their excess fruit." (Br. p. 59.) Appellant ignores, for example, this testimony by Mr. Lo Bue:

> "Q. What did you have in mind primarily in filing this petition? A. We thought our legal rights was being violated by having this fruit go to waste.
>
> Q. Did I advise you that the only way to proceed, in order to get a determination on those rights, was through the filing of a 15(A) petition? A. Yes." [R. 107, 108.]

Next, the appellant argues that Lo Bue Brothers manifested no interest in the outcome of the 15(A) petition after it was filed, basing this unwarranted conclusion on the fact that Mr. Woodall, sales manager for Lo Bue Brothers, testified that he could not remember whether he had conferred with Lo Bue Brothers' attorney before the day of the hearing on the petition, and on the further fact that Lo Bue Brothers did not appeal to the District

Court from the adverse ruling of the Judicial Officer on the petition.

In the first place, Mr. Lo Bue was not asked whether he had conferred with his attorney in preparation for the hearing. In the second place, it was stipulated that at the hearing on the petition Lo Bue Brothers was present with counsel at the hearing and introduced oral and documentary evidence in support of the petition, and that Lo Bue Brothers filed a brief, and also filed written exceptions to the report of the Hearing Examiner. [R. 27, 28.] Furthermore, the proceedings at the hearing on the 15(A) petition are incorporated in the Transcript of Record herein. [R. 199-331.] It will be observed that the transcript of the oral proceedings at the administrative hearing is somewhat longer than the transcript of the oral proceedings at the trial in the District Court.

It is true, of course, that Lo Bue Brothers did not appeal to the District Court. It is also true that the Judicial Officer's adverse decision was not issued until December 3, 1956. [R. 28.] By that time the next navel orange shipping season was well under way, and the Navel Orange Administrative Committee was not proposing to repeat its unprecedented action of restricting the shipment of Central California navel oranges beyond their historical marketing period. The question raised by Lo Bue Brothers 15(A) petition was not technically moot, but for all practical purposes it was moot, so Lo Bue Brothers decided not to press its contentions further.

Generally, the appellant refers rather contemptuously to the filing of a 15(A) petition as a "maneuver," and seems to take the position that the very fact that a petitioner has the temerity to avail himself of his right under the statute to disregard the obligation imposed upon him of which he

complains, from the time he files his petition with the Secretary of Agriculture until he is served with a restraining order, is alone sufficient to establish his lack of good faith in filing the petition. If such a contention were upheld, it would completely nullify the statutory provision and would thwart and defeat the obvious intent of the Congress in enacting it.

On the other hand, there are several circumstances which completely refute the appellant's argument against the good faith of Lo Bue Brothers in filing its petition. It should be remarked, parenthetically, that the phrase in the statute, "and not for delay," has no application here, because there was nothing that could be delayed by the filing of this petition.

First of all, Lo Bue Brothers, having stated its complaint to an attorney experienced in such matters, was advised by him that in his opinion there was grave doubt as to the legality of the action of the Advisory Committee complained of. In his decision the Judicial Officer held, at least inferentially, that Lo Bue Brothers' petition presented substantial and important questions. [R. 340.]

Next, despite the vigorous contention and urging of counsel for the Department of Agriculture at the administrative hearing and in his brief that there should be a finding of lack of good faith on the part of Lo Bue Brothers in filing its petition, the Department's Judicial Officer refused to make such a finding or conclusion. [R. 347, 88.]

Finally, in spite of all the argument in its brief, the appellant has tacitly admitted that Lo Bue Brothers' 15(A) petition was filed and prosecuted in good faith. In paragraph XI of the complaint herein it is alleged that during the weekly period covered by Regulation No. 82,

April 8 to April 15, 1956, Lo Bue Brothers exceeded its allotment by 8,848 cartons, 2,933 cartons of which were handled in excess of allotment "prior to April 9, 1956, the date on which Lo Bue filed with the Secretary a petition under Section 608c(15)(A) of the act." [R. 8.] Yet the appellant sought to recover a penalty or forfeiture only on the 2,933 excess cartons handled prior to April 9, and not on the 5,915 additional excess cartons handled on and after April 9 and until a restraining order was issued and served on April 12. [R. 9, 10.] That can mean only one thing, namely, that the appellant has conceded that Lo Bue Brothers' petition was filed and prosecuted in good faith, and that it therefore protected Lo Bue Brothers on the 5,915 excess cartons shipped after it was filed. If it had not been filed and prosecuted in good faith, it would have afforded no protection at all.

It is submitted that the finding of the District Court that Lo Bue Brothers acted in good faith is fully supported and justified by the evidence, and is, indeed, the only finding on that point that could possibly be made.

## The Advice Relied Upon by Appellees Was Fully Justified.

The Congress was well aware that as a practical matter the administrative procedure to be followed upon the filing of a petition under Section 608c(15)(A) of the Act would be much too slow to afford any relief whatever to a petitioner from an order or obligation imposed in connection therewith, no matter how unreasonable or unlawful it might be, in the case of perishable commodities. Therefore, by Section 608c(14) it exempted petitioners, filing and prosecuting petitions in good faith and not for delay, from penalties for violations occurring between the date upon which the petition was filed with the Secretary

and the date upon which notice of the Secretary's ruling thereon was given to the petitioner.

It is inconceivable that Congress intended to protect such petitioners from maximum fines of $500.00 for violations occurring during the pendency of a petition and at the same time leave them subject to unlimited civil penalties or forfeitures for the same violations, which could run into hundreds of thousands or even millions of dollars. And there is definite evidence that Congress had no such intention.

The provisions of law of which 7 U.S.C. 608a and 7 U.S.C. 608c are a part were originally enacted as Title I of the Agricultural Adjustment Act of May 12, 1933, 48 Stat. 31. The original of 608a was added to said Title I by the Act of May 9, 1934, 48 Stat. 670. Said Title I was further amended by the Act of August 24, 1935, 49 Stat. 750. This 1935 Act added the present Section 608c (14) and (15), 49 Stat. 759, 760. The 1935 Act originated as Bill No. H.R. 8492. When that Bill went to the Senate, the Senate Committee on Agriculture and Forestry in reporting it out recommended an amendment to Section 608c(14) to make the proviso read as it does in its present form. The second paragraph of the comments of the Senate Committee, Senate Report 1011, 74th Congress, page 14, is in part as follows:

> "During the period while any such petition is pending before the Secretary and until notice of the Secretary's ruling is given to the petitioner, *the penalties imposed by the Act for violation of an Order cannot be imposed upon the petitioner* if the Court finds that the petition was filed in good faith and not for delay. The Secretary may, nevertheless, during this period proceed to obtain an injunction against the petitioner pursuant to Section 8a (6) of the Agricultural Ad-

justment Act. . . . It is believed that these provisions establish an equitable and expeditious procedure for testing the validity of orders, without hampering the Government's power to enforce compliance with their terms." (Emphasis supplied.)

This legislation was reenacted by the Act of June 3, 1937, 50 Stat. 246.

During the entire existence of this legislation, only three attempts have been made to impose penalties or forfeitures under Section 608a(5), prior to the present case. Those three actions are the ones referred to in the District Court's Memorandum Decision. [R. 65-67, 70, 71.] They are *United States v. William S. Wright,* No. 3036-H-Civil, *United States v. Alexander Chaskin,* No. 3065-O'C-Civil, and *United States v. A. Levy & J. Zentner Co., et al.,* No. 3081-H-Civil, all in the Southern District of California, and all decided by the late Judge Harry A. Hollzer in 1944. In all three of these cases the Court held that the immunity provided by the proviso in Section 608c(14) extended to civil penalties as well as criminal penalties.

In the *A. Levy & J. Zentner Co.* case, the Court made the following conclusions of law:

"The defendant Vincent J. Squillante, having failed to file a petition pursuant to said subsection (15) of Sec. 608(c) Title 7 U.S.C. and having aided and abetted in the commission of the violation described herein, is liable on account thereof. Said statute is penal in its nature and must be strictly construed.

"The plaintiff is entitled to recover against the defendant Vincent J. Squillante, the statutory forfeitures provided in Sec. 608(a) Title 7, U.S.C. subsection 5." [R. 66, 67.]

In the *Wright* and *Chaskin* cases the Court made identical conclusions of law, except for the names, as follows:

> "That the provisions of the statute under which these actions are being prosecuted are penal in character and therefore must be construed strictly.
>
> "Since a petition pursuant to Subsection 15, Section 608(c) Title 7 U.S.C. was filed and prosecuted by defendant, William S. Wright, in good faith and not for delay, no penalty can be imposed and no forfeitures can be recovered against said defendant William S. Wright for any of the violations involved herein." [R. 66.]

No appeal was taken by the United States from any of the above decisions. [R. 66.]

Now the appellant is seeking to attack Judge Hollzer's decisions collaterally. The elaborate argument in appellant's brief would have been equally applicable in 1944, and it should have been made in an appeal at that time, if the appellant is so sure that these decisions were wrong. The District Court correctly held that the soundness of Judge Hollzer's decisions is not an issue in the present case. [R. 67.]

The lengthy, theoretical, economic argument of appellant, designed to show that triple forfeitures are essential to enforcement of regulations issued under the Act, falls very flat when it is remembered that this particular legislation has been in effect for 22 years, that during all that time only three previous attempts have been made to collect triple forfeitures, all in 1944, and that enforcement during the ensuing 15 years has apparently progressed satisfactorily.

It is difficult to understand how the appellant can maintain that the legal advice given the appellees, based on the only court decisions on the subject in the entire United States, was erroneous. [R. 182, 69, 89, 90.] Can the government set traps for its citizens by failing to appeal from adverse decisions and allowing them to stand as the law of the land, and then claim that a citizen has no right to rely on the advice of his attorney given in conformity with those decisions?

Despite all of its arguments to the contrary, the appellant has tacitly admitted that the immunity proviso in Section 608c(14) of the Act does apply to the triple forfeitures provided for in Section 608a(5), just as Judge Hollzer decided that it did. As pointed out above, paragraph XI of the complaint herein alleges that during the weekly period covered by Regulation No. 82, April 8 to April 15, 1956, Lo Bue Brothers exceeded its allotment by 8,848 cartons, 2,933 cartons of which were handled in excess of allotment "prior to April 9, 1956, the date on which Lo Bue filed with the Secretary a petition under Section 608c(15)(A) of the act." [R. 8.] Yet the appellant sought to recover a penalty or forfeiture only on the 2,933 excess cartons handled prior to April 9, and not on the 5,915 additional excess cartons handled on and after April 9, and until a restraining order was issued and served on April 12. [R. 9, 10.] That means, not only that the appellant has conceded that Lo Bue Brothers' petition was filed and prosecuted in good faith, as pointed out above, but also that the filing of it protected Lo Bue Brothers from the triple forfeitures of Section 608a(5), as well as from criminal penalties, on the 5,915 excess cartons shipped after the petition was filed. There is no other possible explanation of the failure of the appellant

to ask for triple forfeitures on those 5,915 additional excess cartons.

In the final analysis, therefore, the appellant's entire case rests solely upon the fact that Lo Bue Brothers made 23 shipments in excess of allotment on Saturday, April 7, 1956, and 3 more excess shipments after midnight on Saturday, that is, early in the morning of Sunday, April 8, 1956 [R. 129] in the mistaken belief that the 15(A) petition was on file, while as a matter of fact it was not actually filed until Monday, April 9, 1956. That information had been given to the appellees by their attorney, and it was based upon knowledge acquired from long, specialized experience in this particular field. [R. 183, 184, 186, 69, 70, 72, 89, 90, 91.]

The 15(A) petition of Lo Bue Brothers was air mailed at Los Angeles on April 5, 1956, and was postmarked at Washington, D. C. on April 6, 1956. [R. 35.] Their attorney's experience, over many years, was that such petitions, air mailed from Los Angeles, were always received and filed by the Secretary of Agriculture the next day. [R. 183, 184, 67, 68, 90.] In this instance, however, the petition was held in the post office at Washington, D. C. from about 2:00 P.M., on Friday, April 6, 1956, until the following Monday, April 9, 1956. [R. 87.]

There is no way of knowing what actually happened, since all those who handled this mail frankly admit that they have no personal recollection or knowledge of the matter, and base their conclusions entirely upon the records shown to them. The only explanation offered for the delay is the inference that this piece of mail arrived at the Washington post office after some arbitrary deadline on Friday, April 6. But that does not check out with the testimony on the subject, which was that "The afternoon

mail for the Agriculture Dept. leaves the United States Post Office at approximately 2:30 to 3:00 p. m. daily except Saturday and Sunday when there is no delivery. Mail arriving at the U. S. Post Office for the Agriculture Dept. after approximately 2:00 p. m. on Friday is held over until the first delivery on Monday morning." [R. 37, 38.] Since this petition did arrive at the U. S. Post Office about 2:00 P. M. on Friday, April 6, [R. 87] an error of some kind or mere carelessness on the part of some postal clerk may have prevented it from being delivered to the Department of Agriculture on that day. Whatever happened, it was beyond the knowledge or control of the appellees, and was contrary to the ordinary course of businesses, as established by long experience and relied upon by the appellees.

Advice and information was given to and recovered and acted upon by the appellees in complete good faith. [R. 72, 90, 91.] It is submitted that the legal advice given was strictly in accordance with the law, and the information given was fully justified by the facts, and that the appellees had every right to act in reliance upon such advice and information.

## PART II.

### The Facts Behind the Amicus Curiae Brief.

The appellees have known from the beginning that the prosecution of this case was instigated and pressed by Sunkist Growers, Inc. Now that Sunkist has come out into the open by filing an *amicus curiae* brief in behalf of the appellant, it becomes necessary to apprise this Court of the underlying facts.

In the opening paragraph of its brief, Sunkist Growers, Inc. gives a modest indication of its size. The original name of this cooperative marketing association was California Fruit Growers Exchange. It changed its name to Sunkist Growers, Inc. to match its top grade brand. This organization controls and markets at least 65% of all the oranges grown in California, and at least 86% of all the lemons grown in California. The extent of this control in the case of lemons is emphasized by the fact that approximately 96% of all the lemons in the United States are produced in California.

Sunkist Growers, Inc. has long boasted that it is the world's largest agricultural cooperative marketing organization. And this may well be true. At any rate, it wields tremendous economic and political power and influence. It has always been a sacred cow of the Department of Agriculture, and this administration is no exception. For instance, shortly after the present Secretary took office, Mr. Karl D. Loos, who is the Sunkist Washington counsel and lobbyist, and whose name is on the brief, was appointed and served for a time as General Counsel of the Department of Agriculture. And Mr. F. R. Wilcox, the Treasurer and General Manager of Sunkist Growers, Inc., was called to Washington to assist in "reorganizing" the Department.

These, and the other top officials of Sunkist Growers, Inc., are all estimable gentlemen, personally. But the organization is a ruthless monopolist which will stop at nothing to impede, cripple, and if possible destroy its competitors.

This is no figment of imagination. Since November 16, 1942, Sunkist Growers, Inc., and its subsidiaries and affiliates, have been subject to the terms of a consent decree made and entered by the United States District Court, Southern District of California, in an action entitled *United States of America v. California Fruit Growers Exchange, et al.* No. 2577-BH, permanently enjoining and restraining them from committing further acts in violation of the anti-trust laws, including a prohibition against obstructing, restricting, or interfering with the purchase by others of fruit through any particular channel or place. That case was prepared and instituted by Mr. Justice Clark of the Supreme Court, who was at that time in charge of the Los Angeles office of the Anti-Trust Division of the Department of Justice. In addition, there are at least two suits by competitors for treble damages under the anti-trust law pending against Sunkist at the present time.

Sunkist Growers, Inc. has always been an enthusiastic supporter of marketing orders under the Agricultural Marketing Agreement Act. Under the provisions of Section 608c(12) of the Act, Sunkist, as a cooperative marketing organization, can and does vote in referendums for or against proposed marketing orders and for or against termination of existing marketing orders, not only for all

of the member growers whose fruit it markets, but also for all non-member growers whose fruit it markets. By thus controlling the nature of the marketing orders put into effect, and through top-heavy representation on the industry committees which administer the orders, Sunkist completely dominates these programs. With the power of Government behind it, this is a potent weapon in the hands of a giant monopolist.

The present case presented in the eyes of Sunkist a golden opportunity to dispose of one more small independent competitior, Lo Bue Brothers, by having a penalty imposed upon the partners, and even upon their sales manager, in an amount which would most certainly bankrupt them all. The behind-the-scenes role played by Sunkist was obvious from the first. At the administrative hearing on Lo Bue Brothers' 15(A) petition, the opposition witnesses produced by counsel for the Department of Agriculture were Sunkist officials who were also members of the Navel Orange Administrative Committee. The principal witness was Mr. M. D. Street, Assistant Treasurer and chief economist of Sunkist Growers, Inc., and also a Committee member, who produced all the charts, graphs, and statistics relied upon by counsel for the Department of Agriculture to defeat Lo Bue Brothers' petition. [R. 281-317.]

In its brief in support of its 15(A) petition Lo Bue Brothers commented on this as follows:

> "In the present instance, the opposition presented by counsel for the Department, while nominally that of the Department itself, was actually the opposition

of Sunkist Growers, Inc. The documentary evidence introduced consisted for the most part of statistics, charts, and graphs prepared by Sunkist from sources chosen by Sunkist; and the principal opposition witness was the top Sunkist economist, who also happens to be a member of the Advisory Committee, (M. D. Street) and who delivered himself of a long-winded exposition of standard Sunkist dogma to the effect that the sole salvation of the California citrus industry lies in more and more rigid volume controls, administered by Sunkist and enforced by Government.

"The Sunkist statistics, charts, and graphs introduced in evidence (if all of the premises, assumptions, suppositions, speculations, estimates, projections, computations and just plain guesses which went into them be accepted as entirely true and correct) were evidently designed to indicate that it least some of the Navel growers, including some in Central California, did pretty well this past season—all things considered. This the aforesaid Sunkist witness characterized as a 'miracle.' He mentioned, incidentally and casually, that total destruction of the crop in Spain had opened up unprecedented export markets, but, quite typically, he gave exclusive credit for the 'miracle' to himself and his fellow miracle workers on the Advisory Committee."

Mr. M. D. Street also appeared as a witness for the appellant at the trial of this case in the District Court. [R. 143-149.]

The evident purpose of this *amicus curiae* brief is to try to show that an offense has been committed by the Lo Bue Brothers so heinous as to justify their economic execution, and to try to make their hoped-for economic death both plausible and palatable.

## The "Facts" in the Amicus Curiae Brief.

This *amicus curiae* brief is really not a brief at all. It is, for the most part, an economic essay. Much of it bears evidence of having been ghost-written by some Sunkist economist; possibly by the head man, Mr. Street.

We do not deem it necessary to enter into a debate with Sunkist over the merits of marketing orders in general. It is noted that much of the economic argument in this brief is based on material and matters entirely outside the record in this case. The brief contains some weird flights of fancy and some of the wildest statements imaginable. Its author at least has the grace to admit that his conclusions are not provable (Br. pp. 13, 14), but that is a gross understatement. Most of these conclusions could be disproved, if they were relevant. We shall limit ourselves to brief comment on a few of the more palpable misstatements.

On page 12 of its brief, Sunkist tries to make it appear that Lo Bue Brothers was responsible for a drop in the price and a decrease in the volume of navel oranges marketed during the week commencing April 8 and ending April 15, 1956. In other words, Sunkist is saying that the twenty-six shipments made by Lo Bue Brothers before April 9 depressed the nationwide market for navel oranges and forced the Navel Orange Administrative Committee to sharply curtail the total quantity of navel oranges allowed to be marketed during the week of April 8.

In the first place, only two of Lo Bue Brothers' twenty-six shipments were actually sold before April 9, and the gross selling price was $3,520.75. [R. 84.]

In the second place, the permissible volume of shipments for any week is fixed by the Administrative Committee and the Secretary of Agriculture not later than

Friday of the preceding week, so that the authorized volume of navel oranges for the week commencing April 8, 1956 was fixed by Friday, April 6, 1956, which was before Lo Bue Brothers had made any of the twenty-six shipments in question.

In the third place the weekly average f. o. b. price of Central California navel oranges, as reported by Sunkist, rose steadily, with some fluctuation, during April and May, 1956, as follows [R. 337]:

| | | |
|---|---|---|
| April 7 | — | $1.87 |
| April 14 | — | 1.75 |
| April 21 | — | 1.95 |
| April 28 | — | 2.29 |
| May 5 | — | 2.22 |
| May 12 | — | 2.45 |
| May 19 | — | 2.59 |
| May 26 | — | 2.55 |

Sunkist's doctrinaire explanation, of course, is that the upward trend was due solely to the enforced restriction of the volume marketed, and that the total destruction of Spain's crop by frost had no bearing on the situation.

In its hysterical buildup to the remarkable conclusion, at the top of page 15 of its brief, that unless the Lo Bue Brothers are punished Sunkist-style, by being put out of business, the whole agricultural economy of the West Coast area may collapse, Sunkist conveniently overlooks a number of obvious facts.

First, what is the explanation of the fact that the Florida citrus industry has gotten along quite well without ever having had a marketing order restricting or regulating the volume of fruit marketed? Could it be that Florida thrives on the market abandoned to it when California restricts the volume of its shipments?

Second, if, as Sunkist says, non-compliance is so contagious, all of the California citrus marketing order should have been destroyed long ago; for many 15(A) petitions have been filed in the past, raising many legal questions concerning all of them.

Third, Congress thought the injunctive remedy provided by Section 608a(6) of the Act afforded sufficient protection against 15(A) petitioners who might seek to avail themselves of the immunity provided by Section 608c(14). That injunctive remedy has been promptly applied to nullify the immunity in each and every 15(A) case. It must be remembered that Lo Bue Brothers was restrained on April 12, 1956, and consented to a *permanent* injunction on April 19, 1956. [R. 88, 89.] Sunkist does not think that remedy is sufficient. It thinks Lo Bue Brothers, and its sales manager, should be penalized in the sum of $149,612.22 on the $1,800.00 netted by Lo Bue Brothers on the twenty-six shipments in question [R. 84] even though no attempt has been made so to penalize any other violator in the past fifteen years.

What Sunkist is really saying is that it doesn't like the right given by the statute to file a 15(A) petition, or at least the right of immunity that goes with it, and thinks it should be abolished. Sunkist can accomplish that result, for all practical purposes, if it can have the Lo Bue Brothers crucified, as a warning to others not to exercise their right to this "maneuver" (they all seem to like that word) no matter how unlawful a marketing order or regulation may be.

It would seem that Sunkist should have its Washington lobbyist, Mr. Loos, try to persuade the Congress to amend the statute, rather than ask this Court to condemn it.

## Conclusion.

The findings and conclusions of the District Court are fully supported by the facts and the law of this case, and are, indeed, inescapable. The judgment appealed from should therefore be affirmed.

Respectfully submitted,

G. V. WEIKERT,

*Attorney for Appellees.*